

Oral Hearing: 6/5/02  
29  
July 10, 2001  
GDH/gdh

THIS DISPOSITION  
IS NOT CITABLE AS PRECEDENT  
OF THE T.T.A.B.

Paper No.

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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Rockline Industries, Inc.  
v.  
Dental Disposables International, Inc.

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Cancellation No. 28,732  
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Request for Reconsideration  
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Beth Ermatinger Hanan of Reinhart, Boerner, Van Deuren, Norris  
& Rieselbach, s.c. for Rockline Industries, Inc.

Brian M. Dingman of Mirick, O'Connell, DeMallie & Lougee, LLP  
for Dental Disposables International, Inc.

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Before Hohein, Hairston and Bucher, Administrative Trademark  
Judges.

Opinion by Hohein, Administrative Trademark Judge:

This panel of the Board, on February 5, 2002, issued  
a decision granting the petition by Rockline Industries, Inc.  
to cancel the registration by Dental Disposables  
International, Inc. for the mark "FRESHEN UP" for "pre-

moistened dental patient wipes."<sup>1</sup> Among other things, we found that petitioner had priority of use of its mark "FRESH'N UP" for pre-moistened wipes and that, in light of the virtual identity of the marks at issue and the substantial identity in nature and use of the respective goods, purchasers who were familiar or acquainted with petitioner's "FRESH'N UP" mark for its pre-moistened towelettes or wipes for cleaning one's hands and face, such as dentists, orthodontists, hygienists and their assistants, could reasonably believe, upon encountering respondent's "FRESHEN UP" mark for its pre-moistened dental patient wipes, that such products emanate from, or are otherwise sponsored by or affiliated with, the same source.

This case now comes up on respondent's timely request, filed on March 5, 2002, for reconsideration of our decision. Petitioner, on March 22, 2002, timely submitted a brief in opposition to such request.

Respondent's request for reconsideration is essentially a rehash of its arguments previously raised in its brief on the case and found to be without merit factually and legally. Contrary to respondent's contention that petitioner "presented no evidence on whether its mark was inherently distinctive or had acquired distinctiveness," we found that

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<sup>1</sup> Reg. No. 2,174,347, issued on July 21, 1998 from an application filed on October 21, 1996, which sets forth a date of first use anywhere and in commerce of March 13, 1996.

the evidence considered as a whole established petitioner as the prior user of its suggestive, and hence inherently distinctive, mark "FRESH'N UP." Respondent, in its answer, never raised the affirmative defense of mere descriptiveness of petitioner's mark nor was such an issue, as we noted in footnote 9 of our opinion, clearly tried by either the express or implied consent of the parties. Moreover, and in any event, we further pointed out that respondent failed to substantiate its assertion of mere descriptiveness inasmuch as the evidence relied upon by respondent, consisting solely of excerpts from the testimony of a layman who is unfamiliar with the technicalities of trademark law, was insufficient to constitute proof of mere descriptiveness.<sup>2</sup>

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<sup>2</sup> Respondent also erroneously maintains, citing *Towers v. Advent Software Inc.*, 913 F.2d 942, 16 USPQ2d (Fed. Cir. 1990), that "the Board has relied solely on the PTO's act of registering Respondent's mark to support Petitioner's argument that its term is distinctive." Respondent insists that, like the situation in the cited case, "[t]he trademarks in this case are different as a whole" and thus "[t]he Board's finding that the petitioner's mark is inherently distinctive ... goes directly against the Federal Circuit's holding in the Towers v. Advent case." However, our finding was not only based on the entire evidentiary record, which demonstrated petitioner's mark to be suggestive instead of merely descriptive of its goods, but this case is distinguishable from *Towers* inasmuch as it involves virtually identical marks. Consequently, we adhere to our further observation in footnote 9 that:

[A]s petitioner has persuasively pointed out, [the fact that] respondent's virtually identical mark 'FRESHEN UP' for essentially the same goods issued on the Principal Register without resort to the provisions of Section 2(f) of the Trademark Act ... is indicative that respondent's mark, and likewise petitioner's mark, is at most highly

The request for reconsideration is accordingly denied.

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suggestive--and hence inherently distinctive--rather than merely descriptive, of the respective goods. We thus disagree with respondent's assertion, as stated in its brief at 14, that "as a matter of law, Rockline's unregistered mark is not inherently distinctive and, as such, Rockline was required to prove that its mark had acquired distinctiveness before Dental Disposables' first use in May 1996" of its mark.